



TELEPHONE NUMBER	813 265-4274	940122
ACCOUNT NUMBER	151227064927131910	
STATEMENT ENDING	Sep 4, 1999	

PAGE2 OF 6

About Your Bill

*It's **ow** privilege
to serve you.*

How to pay your bill

Please mail your payment using the return envelope. Include the payment stub to ensure proper credit.

If you pay in person, bring your entire bill, including the payment stub, to an authorized payment location.

Be sure to write your area code and telephone number **on your** check.

Questions about your bill

If you have questions concerning your bill, please call the appropriate 'billing questions' number which appears in the **yellow** band on your bill.

Previous payments

You may have sent us a payment not processed in time to be reflected on your current billing statement. Please deduct any amount already paid before sending your current payment.

Past due amounts

The due date on your bill only applies to the current charges. Any past due amount should be paid immediately.

service suspension for non-payment

Based on the state **regulatory** and notice requirements, once your bill is **past** due, **some** or all of your **service** may be suspended. Charges may apply to suspend and **reconnect** service. **A** deposit to reestablish your service may also be required.

Returned checks

In some states, a returned **check** charge may apply for each check returned for any reason.

Additional information

Please consult your **local** Directory for additional billing and service information.

Mail payments to:
GTE Florida
P.O. Box 31122
Tampa, FL
33631-3122





TELEPHONE NUMBER 813 265-4274 940122
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GTE SmartCall
Products and
Services Automated
Helpline
1 800 GTE-6855
1 800 483-6855

GTE REGULATED SERVICE (Sep 4 to Oct 4)

Description	Qty	Unit Rate	
1 Tele/access act charge	1	.09	.09
2 Residence line - measured rate	1	7.00	7.00
3 Interstate non-primary access	1	6.07	6.07
Total			\$ 13.16

GTE LOCAL CALLS

Billing for
813 265-4274

Extended Calling Service Summary

call area	No. of calls	Rate per call	
4 Clearwater	1	.2500	.25
Total			\$.25

Total local calls \$.25

GTE REGULATED LONG DISTANCE CALLS

GTE Total Call Plan Calls

Calls billed to
813 265-4274

Direct Dialed Calls

Date	Time	Place called	VA	Number called	Period	Min.	
5 Aug 12	518 pm	Alexandria	VA	+703 351-8662		1	.14
Subtotal							.14

+ Indicates service provided by other GTE Companies.

Summary of GTE Total Call Plan

6 Plan calls			
Total			\$.14

GTE Total Call Plan start date: 03/26/99

Thank you for using GTE Long Distance

Calls billed to
813 265-4274

Miscellaneous Calling Services

Date	Time	Service type	Period	Min.	
7 Aug 15	9:59 pm	Automatic Call Return			.75
8 Aug 31	1007 pm	Automatic Call Return			.75
Total					\$ 1.50

Total regulated long distance charges \$ 1.64

T= 3

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MISCELLANEOUS CHARGES AND CREDITS

1	Late payment charge on \$11.01 at 1.50%	.17
2	FCC Primary Carrier Addl Line 1 at 1.51	1.51
3	Monthly Minimum Charge for GTE Long Distance	2.86

When GTE LD charges are less than \$3.00, the Monthly Minimum Charge will be the difference between those charges and \$3.00.
All GTE LD charges except for taxes and surcharges are included.

Total \$ 4.54

For an explanation of the FCC Primary Carrier Charge(s) listed above, please call toll-free 1-800-839-4447.

REGULATED SERVICE TAXES AND SURCHARGES

4	Federal excise tax at 3.00%	.52
5	Florida intrastate gross receipts tax	.44
6	County 911 Funding Fee	.39
7	Svc Provider Number Portability Fee	.36
Total		\$ 1.71

GTE regulated service charges \$2130

Nonpayment of regulated services may result in disconnection of your local telephone service. Any questions concerning these charges, please call the inquiry number provided on Page 1.

OPTIONAL GTE**NON-REGULATED SERVICE (Sep 4 to Oct 4)**

Description	Qty	Unit Rate	
8 Inside Wire Maintenance plan	1	3.95	3.95
Total			\$ 3.95



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MISCELLANEOUS CHARGES AND CREDITS

1 Late payment charge on \$3.90 at 1.50%		.06
	Total	\$.06

GTE non-regulated service charges	\$4.01
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Total GTE charges	\$ 25.31
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If you ~~experience~~ **repair** problems with your GTE Long Distance, please ~~call~~ **1 800 483-8494**.

About your taxes...

Revised charges for government taxes on certain products and services may be included in this month's **bill** if they **are** applicable to your account.

Questions? Call **us** at the toll-free number listed on the front page of **your** bill.

T= 5

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TELEPHONE NUMBER	813 265-4414	940122
ACCOUNT NUMBER	151227064927131910	
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Some tips for your modem connection

Follow ~~this~~ checklist to help you make waves on the Web:

* ~~Do~~ you have VIP Alert or Call Waiting? Make sure these special features don't cut off your connection.

- Turn ~~off~~ VIP Alert when you want to get on the Web by dialing *E1 on your phone. When you're ~~off~~ the computer, just ~~dial~~ *61 and the ~~service is~~ back on your line.

- ~~Dial~~ *70 to cancel your Call Waiting.** You'll have the service again when you disconnect from the Internet.

* Have you called your Internet service provider to make sure your computer is ~~set~~ up correctly? ~~An~~ incorrect configuration could be the culprit.

* ~~Are~~ you using your modem on a voice line? Since we develop our residence and business lines to give you high-quality voice service, they're not set up to handle high-speed data transmission. While you can use your voice line to get on the Internet, you may not be able to get the highest speed available on your modem.

Check out some of our products and services that may be a better fit for what ~~you~~ want in data communication.*** Call ~~us~~ at the toll-free number listed on the ~~first~~ page of your GTE ~~bill~~ for more ~~info~~.

***Cancel Call Waiting is a separate service from Call Warring in some areas.*

****May nor be available in all areas.*

Give the gift of gab!

Telephones make great gifts. For a variety of phone selections, call toll-free 1-800-GTE-6697 or visit your nearest GTE Phone Mart.

www.gte.com

T= 6

15 1227 8132654274 940122 10 04 FL212*HBRDA1 00007312 5F0000049682

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FILED¹⁰

02 FEB -8 AM 9:02

CLERK, U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

LINDA THORPE,

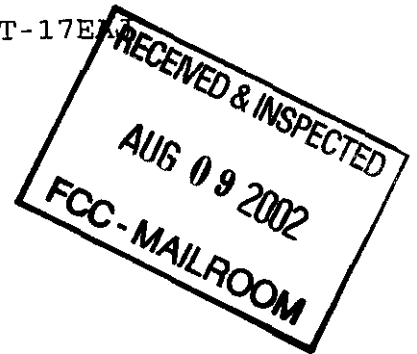
Plaintiff,

vs

CASE NO. 8:00-CV-1231-T-17E

GTE CORPORATION, et
al.,

Defendants.



ORDER

This cause is before the Court on the following pending motions:

Dkt. 13 Motion to Dismiss
Dkt. 30 Response
Dkt. 14 Memorandum
Dkt. 16 Motion to Dismiss
Dkt. 29 Response
Dkt. 17 Memorandum
Dkt. 19 Motion to Dismiss
Dkt. 27 Response
Dkt. 23 Motion to Remand
Dkt. 32 Response
Dkt. 34 Motion for Judgment on the Pleadings
And for Stay and Referral
Dkt. 35 Memorandum
Dkt. 40 Motion for Leave to Amend
Dkt. 41 Supplemental Filing
Dkt. 42 Response
Dkt. 46 Supplemental Filing

EXHIBIT B

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I. Background

This is a multi-count Complaint brought by Plaintiff Linda Thorpe, who has been a customer of GTE Florida and AT&T for long distance service. Plaintiff installed a second phone line as a dedicated line, and does not want long distance service on that line, but is being charged for it. Plaintiff has brought her Complaint against certain local exchange carriers and interexchange carriers.

Count I is for declaratory and injunctive relief under the Florida Unfair and Deceptive Trade Practices Act, the Federal Trade Commission Act and related acts ("FDUPTA"). Plaintiff alleges that charging for unnecessary and unwanted long distance service pursuant to "default" contracts is unfair competition, unconscionable, unfair and deceptive. Plaintiff further alleges that continuing to bill and charge, and collect money for these services is unfair.

Count II is for damages under FDUPTA. Plaintiff alleges a private cause of action against Defendants for charging for unwanted and unnecessary long distance service pursuant to "negative option" or "default" contracts. Plaintiff alleges that collecting money for the "default" contracts is against public policy and is otherwise unfair and inequitable.

Count III is for restitution of moneys paid under void or voidable contracts. Plaintiff seeks a ruling that the provisions of Defendants' contracts for unwanted long distance service are void or voidable.

Count IV is for breach of contract. Plaintiff alleges that she has a contract or a "quasi contract" with Defendants for a local modem phone line, and Defendants have breached the contract by charging and collecting for unnecessary and unwanted long distance service.

Count V is for breach of duty of good faith and fair dealing. Plaintiff alleges Defendants have a duty of good faith and fair dealing implied in each contract with Plaintiff. Plaintiff seeks damages.

Dkt. 13 Motion to Dismiss

Defendant GTE Florida requests that this case be dismissed or stayed because Plaintiff's Complaint concerns conduct that is within the primary jurisdiction of the FCC. 47 U.S.C. Sec. 151. Defendant requests referral of this case to the FCC since it has been delegated the authority to determine national telecommunications policy, and has the necessary experience to adjudicate this direct challenge to the way in which local and long distance telecommunications providers bill for services.

Defendants argues that Plaintiff directly challenges two essential elements of interstate long distance services, both of which are regulated by the FCC, and governed by applicable tariffs filed with the FCC. These elements are: 1) the provision of, and charges for, long distance access by local exchange carriers (i.e. GTE Florida); and 2) the provision of, and charges for, long distance services by interexchange carriers (i.e. AT&T) .

Defendant argues that Section 251 of the Communications Act requires that all local exchange carriers interconnect their customers with all other local and long distance telecommunications providers. In other words, Defendant cannot offer a "local service only" option.

Defendant further argues that Plaintiff's challenge to specific charges on her bill fails because filed tariffs exclusively control the rights and liabilities between the parties as to the charges. Defendant argues that Plaintiff's state law claims are barred by the federal tariffs. Since rate making procedures and resulting tariffs are public documents, the Court is to presume the consumer's knowledge of the published rate. The FCC imposes a national framework for the types of access that are mandatory or permissible for carriers. The enforcement of the tariffs is left to the FCC.

Defendant has identified the regulated and tariffed charges for interstate access that appear on Plaintiff's telephone bills. These include the Subscriber Line Charge, the Common Carrier Line Charge and the Presubscribed Interexchange Charge. Defendant argues that the FCC has established rules and regulations that control the outcome of the Plaintiff's claims, and Plaintiff's Complaint should be dismissed.

Defendant argues that under the filed rate doctrine, there is no legal injury if a plaintiff has been charged the tariffed rate. Defendant argues that the claim for restitution must fail because Plaintiff is presumed to know the tariff's terms. Defendant argues that the FDUPTA claims fail because the conduct complained of is permitted by the FCC and the PSC. In the

alternative, Defendant argues that the Complaint should be stayed and referred to the FCC under the doctrine of primary jurisdiction.

In her response, Plaintiff argues that the Local Service Providers make no effort to disclose to consumers that it is not necessary to have long distance service for a phone line for a computer modem, and will only terminate long distance service by affirmative request. Plaintiff contends she is not complaining of the right of a long distance service provider to provide a fee for long distance service, but is complaining of the failure to disclose the imposition of a long distance service charge on a phone line knowing that the line is being used for only local calls. Plaintiff argues that she is complaining of "slamming" a long distance fee not consented to by the customer.

Plaintiff argues that her claims are not preempted by the FCA, 47 U.S.C. Sec. 151. Plaintiff argues that this case is about other terms and conditions which states are permitted to regulate, such as billing information, practices and disputes. Plaintiff emphasized that her challenge is to Defendants' deceptive practice of nondisclosure. Plaintiff further argues that the FCA does not mandate that local exchange carriers provide access to a long distance network on each residential line. Plaintiff further argues 'that which local exchange carriers may recovery costs for providing the "local loop", Plaintiff has been slammed by the discretionary pass-through of costs without knowledge and consent.

The Court has examined the allegations of the Complaint. These allegations center around the fact that Plaintiff does not

Case No. 8:00-CV-1231-T-17EAJ

want long distance service on her second phone line, but Defendants contend Plaintiff must accept it under the national framework of the FCA, and pay the associated charges. This case is not about hidden charges, charges for uncompleted calls or charges for "rounding up" of minutes. Defendants have argued that the filed tariffs disclose the charges at issue. After consideration, the Court concludes it is appropriate to stay this case, and refer the Complaint to the Federal Communications Commission. The Motion to Dismiss **denied** without prejudice. This case **is referred** to the Federal Communications Commission, and it will be **administratively closed** for an indefinite time until there is a determination by the FCC. Plaintiff shall file a Motion to Reopen within ten days of a final decision.

Dkt. 16 Motion to Dismiss for Lack of Personal Jurisdiction
Dkt. 29 Response

Defendant GTE has argued there is no personal jurisdiction over Defendant as it does not have minimum contacts with Florida. Plaintiff responds that Plaintiff has alleged that Defendant does business in Florida and controls its subsidiary GTE Florida. Plaintiff argues that there are systematic and continuous general business contacts with Florida through contracts or agreements with residents of this state. After consideration, the Motion to Dismiss is **denied**.

Dkt. 19 Motion to Dismiss
Dkt. 27 Response

Defendant MCI argues that there is no allegation that Plaintiff was ever a customer of MCI. Plaintiff responds that GTE's policy of assigning a long distance carrier benefits MCI. The Court will grant the Motion to Dismiss. The Court notes that

Case No. 8:00-CV-1231-T-17EAJ

this case was brought as a class action. In the event that this case is reopened, the Court will permit Plaintiff to join additional parties at a later time.

Dkt. 23 Motion to Remand
Dkt. 32 Response

Plaintiff seeks to remand this case because there are only state law claims. The Court has determined that Plaintiff has brought a federal claim that should be referred to the FCC. The Court **denies** the Motion to Remand.

Dkt. 34 Motion for Judgment on Pleadings or to Stay and Refer
Dkt. 37 Response

The Court has determined that Plaintiff has brought a federal claim that should be referred to the FCC. The Court grants the Motion to Stay and Refer and **denies** the Motion for Judgment on the Pleadings without prejudice.

Dkt. 40 Motion for Leave to Amend
Dkt. 42 Response

After consideration, the Court **denies** the Motion to Amend without prejudice.

8th DONE and ORDERED in Chambers, in Tampa, Florida on this
day of February, 2002.



ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION



LINDA THORPE,

Plaintiff.

vs.

GTE CORPORATION, GTE FLORIDA
INCORPORATED, AT&T CORP.,
SPRINT-FLORIDA, INCORPORATED,
and MCI WORLD COM NETWORK
SERVICES, INC.

Defendants.

Civil Action No. 8100 - CV - 1231-T-17C

NOTICE OF REMOVAL

Defendant GTE Florida Incorporated ("GTEFlorida"), on its own behalf and with the consent of Defendants GTE Corporation, AT&T Corp. ("AT&T"), MCI Worldcom Network Services, Inc. ("MCI"), and Sprint-Florida, Incorporated ("Sprint-Florida"), files this Notice of Removal, pursuant to 28 U.S.C. §§ 1331, 1441, and 1446, and respectfully shows this Court as follows:

1.

Plaintiff Linda Thorpe brought suit against Defendants in the Circuit Court of Hillsborough County, Florida, Civil Action No. 0003537 ("State Court Action"). Defendants GTE Florida, GTE Corporation, and AT&T were served with the Summons

GTE Corporation is not subject to the personal jurisdiction of this Court, but appears for the limited purpose of consenting to this Notice of Removal.

EXHIBIT C

and Complaint on May 22, 2000. MCI and Sprint were similarly served on June 12, 2000. Service was the first receipt by the respective Defendants, by service or otherwise, of a Complaint setting forth claims for relief upon which this action is based. Defendants have not yet answered, moved, or otherwise pled with respect to the State Court Action, and their time to do so has not yet expired.

2.

Plaintiffs claims directly challenge two essential elements of interstate long distance telephone services, and both are regulated by the Federal Communications Commission ("FCC") pursuant to federal law and governed by applicable tariffs filed with the FCC. Those two elements are: (a) the provision of, and charges for, long distance access by local exchange carriers, such as GTE Florida, and (b) the provision of, and charges for, long distance services by interexchange carriers, such as AT&T and MCI.

3.

This case is removable by reason of federal question jurisdiction because the Plaintiff asserts claims that require the resolution of questions that are entirely federal in character and, moreover, are completely preempted by federal law. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987) (complete preemption provides a basis for removal); and *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983). All claims raising "questions concerning the duties, charges and liabilities of . . . telephone companies with respect to interstate communications service are to be governed solely by federal law and . . . the states are precluded from acting in

this area.” *MCI Communications Corp. v. O’Brien Marketing, Inc.*, 913 F. Supp. 1536, 1540 (S.D. Fla. 1995) (quoting *Ivy Broad. Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968)). Here, Plaintiff has asserted claims, the resolution of which are controlled by federal law and by federal tariffs that the Defendants have filed with the FCC.

4.

Plaintiff has asserted certain claims that are directly related to tariffs that the Defendants, pursuant to the requirements of the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, must file with the FCC. The Communications Act regulates “interstate and foreign commerce in communications by wire and radio so as to make available . . . service with adequate facilities at reasonable charges.” 47 U.S.C. § 151. Section 203 of the Communications Act requires common carriers, including the Defendants, to “file with the [FCC] and print and keep open for public inspection schedules showing all charges . . . and showing the classification, practices, and regulations affecting such charges.” 47 U.S.C. § 203(a). *See American Tel. & Tel. Co. v. Central Office Tele. Inc.*, 524 U.S. 214, 221 (1998); *MCI Telecomm. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218 (1994). As mandated by Section 203(c), no carrier shall “(1) charge, demand, collect or receive a greater or less or different compensation for such communication, or for any service in connection therewith . . . or (2) refund or remit by any means or device any portion of the charges so specified. . . .” 47 U.S.C. § 203(c). Once filed and effective, these tariffs “conclusively and exclusively control the rights and liabilities between the parties,” *MCI Tele. Corp. v. Graphnet, Inc.*, 881 F. Supp. 126, 132 (D. N.J. 1995), and

have the force and effect of federal law.² *American Tel. & Tel. Co. v. City of New York*, 83 F.3d 549, 552 (2d Cir. 1996); *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir. 1966) (“[A] tariff, required by law to be filed, is not a mere contract. It is the law.”). The FCC has the statutory authority to seek monetary and injunctive relief for violations of this tariff-filing requirement. *See* 47 U.S.C. § 203(e).

5.

Plaintiff has also asserted certain claims that may be fairly read to allege that Defendants have engaged in unjust and unreasonable practices when they provided and billed for allegedly unwanted long distance access and/or service. Section 201(b) of the Communications Act prohibits any common carrier engaged in interstate wire communication from engaging in any “charge, practice, classification, or regulation that is unjust or unreasonable.” 47 U.S.C. § 201(b). Congress has manifested its clear intent that cases, such as this, that present direct challenges to the provision of interstate wire communications, be removable to federal court by providing that the federal courts and the FCC shall have exclusive jurisdiction over such disputes. *See* 47 U.S.C. § 207. Accordingly, this Court has jurisdiction over this matter by reason of the federal question(s) presented, pursuant to 28 U.S.C. § 1331, and Defendants may properly remove this action pursuant to 28 U.S.C. §§ 1441 and 1446.

² This Court may take judicial notice of Defendants’ federal rate filings. *See, e.g.*, Fed. R. Evid. 201; *Cash Inn of Dade, Inc. v. Metropolitan Dade Cty.*, 938 F.2d 1239, 1242-43 (11th Cir. 1991) (courts may take judicial notice of records before and orders of administrative bodies); *see also Marcus v. AT&T Corp.*, 938 F. Supp. 1158, 1164-65 (S.D.N.Y. 1996), *aff’d*, 138 F.3d 46 (2nd Cir. 1998) (courts may take judicial notice of tariffs filed with the FCC.)

6.

To the extent fewer than all of the claims asserted in the Complaint are removable on the ground that they arise under the laws of the United States, this Court has supplemental jurisdiction over such claims. 28 U.S.C. § 1441(c). Pursuant to 28 U.S.C. § 1367, where the additional claims are so related to the claims in the action within the Court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution, the District Court shall have supplemental jurisdiction over those claims.

7.

In compliance with Local Rule 4.02, Defendant GTE Florida attaches hereto as Exhibit I, true and legible copies of all process, pleadings, orders, and other papers or exhibits of every kind on file in the State Court Action as of the date of filing of this Notice of Removal.

8.

Defendant GTE Florida files this Notice of Removal within thirty (30) days of the first service of Plaintiffs Complaint in the State Court Action. Plaintiffs Complaint was the first pleading received by any Defendant, by service or otherwise, that sets forth the claims for relief upon which such action is based.

9.

The State Court in which this action was commenced is within this Court's district. Therefore, this action is properly removable to this Court pursuant to 28 U.S.C. § 1441(a).

10.

Written notice of the filing of this Notice of Removal will be given to all adverse parties as required by law.


11.

A true and correct copy of this Notice of Removal will be promptly filed with the Clerk of the Circuit Court of Hillsborough County, Florida, as required by law.

12.

A completed Federal Civil Cover Sheet and the removal fee of \$150 accompany this Notice of Removal. Additionally, a written Consent to Removal from each of the other Defendants is being filed simultaneously with this Notice of Removal.

WHEREFORE, GTE Florida Incorporated, on behalf of itself and all consenting Defendants, having satisfied all requirements for removal pursuant to 28 U.S.C. §§ 1331, 1441, and 1446, respectfully submits this Notice of Removal of the State Court Action to this Court, this 21st day of June, 2000.



Michael S. Hooker

Florida Bar No. 330655

Guy McConnell

Florida Bar No. 472697

**GLENN RASMUSSEN FOGARTY
& HOOKER, P.A.**

100 South Ashley Drive, Suite 1300

Post Office Box 3333

Tampa, Florida 33601-3333

(813) 229-3333

Peter Kontio
Michael P. Kenny
William H. Jordan
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000

ATTORNEYS FOR DEFENDANT
GTE FLORIDA INCORPORATED

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Notice Of Removal upon counsel of record for Plaintiff and counsel for other Defendants, by causing a copy of same to be deposited in the United States Mail, postage prepaid, and properly addressed as follows:

James **A.** Staack, Esq.
STAACK, SIMMS & HERNANDEZ, P.A.
121 North Osceola Avenue
2nd Floor
Clearwater, Florida 34615

Peter Kontio
Michael P. Kenny
William H. Jordan
ALSTON & BIRD LLP
One Atlantic Center
1201 West Peachtree Street
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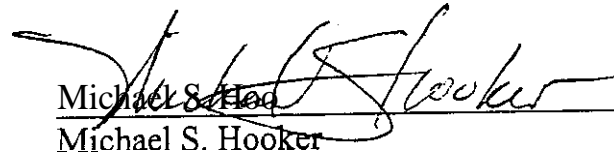
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Howard Spierer
AT&T Corp.
Room 1145L3
295 North Maple Avenue
Basking Ridge, NJ 07920

this 21st day of June, 2000.


~~Michael S. Hooker~~
Michael S. Hooker
Attorney for Defendant GTE Florida
Incorporated

2277-00400^N Notice of Filing Notice of Removal

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LINDA THORPE,

Plaintiff,

Case No.: 8:00-CV-1231-T-17C

vs.

GTE CORPORATION, GTE FLORIDA
INCORPORATED, AT&T CORP.,
SPRINT-FLORIDA, INCORPORATED,
and MCI WORLDCOM NETWORK
SERVICES, INC.,

Defendants.



MOTION TO REMAND

COMES NOW, the Representative Plaintiff, LINDA THORPE, by and through her undersigned counsel, and files this Motion to Remand, and as good grounds therefor would state:

FACTUAL BACKGROUND

Plaintiff, LINDA THORPE (hereinafter referred to as "THORPE"), for herself and all others similarly situated (hereinafter referred to as "Class Members"), filed a class action suit against the Defendants herein alleging five state causes of action:

- a. Count I for declaratory relief and injunction under Florida Deceptive and Unfair Trade Practices Act (hereinafter referred to as "FDUPTA");
- b. Count II for damages pursuant to FDUPTA;
- c. Count III for restitution;

- d. Count IV for breach of contract;
- e. Count V for breach of duty of good faith and fair dealing.

THORPE has not filed any causes of action under any Federal statute nor has she asserted any claims arising from the Constitution of the United States. Whereas THORPE may have had causes of action under a variety of Federal statutes, she, on behalf of all similarly situated Class Members, have decided to pursue only state claims. Nonetheless, the Defendants have removed this lawsuit, alleging that THORPE has claimed that she is challenging rates and tariffs of interstate long distance telephone services, which are regulated by the Federal Communications Commission (hereinafter referred to as "FCC"). The Defendants allege that the complaint requires this Court to apply the Federal Communications Act (hereinafter referred to as "the Act") because the suit involves issues regarding rates and/or tariffs.

MEMORANDUM OF LAW

I.

Pursuant to 28U.S.C. §1447(c), this Court has no subject matter jurisdiction, and the case must be remanded to state court.

The Defendants have attempted to make this class action case something that it is not -- an action brought pursuant to the Act. The Defendants argue that the Act completely pre-empts all state causes of action and, therefore, this Court has "federal question" jurisdiction. The Defendants' arguments are wholly without merit.

In the case of DeCastro v. AWACS, Inc., 935 F. Supp. 541 (USDC New Jersey 1996)¹, the

¹ A full copy of the DeCastro decision is attached hereto as Exhibit "A".

representative plaintiff filed a class action complaint in New Jersey state court against Defendant, AWACS, Inc. (a/k/a “Comcast”) alleging, like in the instant case, consumer fraud and other state law claims for Comcast’s alleged failure to disclose to its cellular telephone customers certain billing practices. Defendant Comcast removed the action to the Federal court claiming that the plaintiffs’ causes of action were completely pre-empted by the Act. DeCastro presents a nearly identical factual and procedural posture as in the instant case. In DeCastro, the court stated:

Comcast also argues that jurisdiction is proper under federal question jurisdiction because the Federal Communications Act pre-empts the state-law class allegations. Federal courts are courts of limited jurisdiction, empowered to hear only those cases authorized by the Constitution or other acts of Congress. Under 28U.S.C. §1441 (a), only state court actions over which “the district courts of the United States have original jurisdiction, may be removed by the defendant.” Absent diversity jurisdiction, federal jurisdiction must be based upon an action “arising under the Constitution, laws or treaties of the United States.” 28U.S.C. §1331. The presence or absence of federal-question jurisdiction is governed by the “well-pleaded complaint rule,” which provides that federal jurisdiction exists only when a federal question is presented on the fact of the plaintiffs properly pleaded complaint. Caterpillar, Inc. v. Williams, 482 U.S. 386,392 (1987). “The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.” *Id.* Under this rule, federal pre-emption is ordinarily a defense to the plaintiffs suit, and, as it does not appear on the face of a well-pleaded complaint, it does not provide a basis for removal under 28 U.S.C. § 1441. “It is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiffs complaint, and even if both parties concede that the federal defense is the only question truly at issue.” *Id.* at 393.

Id. at 548.

The court went on to further state:

In this case, a federal question does not appear upon the face of the class complaint. Comcast argues, however, that Congress, via adoption of the Federal Communications Act of 1934, as amended, clearly has evinced an intent to completely pre-empt all state claims against telecommunications providers that challenge the rates and billing practices of those providers. According to Comcast, the plaintiffs' complaint: (1) directly challenges Comcast's rate structure and the manner in which Comcast applies its rates; (2) seeks a rebate to a class **of** consumers **of** rate charges imposed over a period of years; and (3) seeks imposition by injunction of an entirely new method **of** applying Comcast's rate structure. Comcast claims that the Federal Communications Commission ("FCC") and the federal courts have exclusive jurisdictions over such complaints against cellular telecommunications carriers under §207 of the Act.

Id. at 549.

Finally, the court added

The United Supreme Court has emphasized the limited nature **of** the complete pre-emption doctrine, finding complete pre-emption only in two circumstances: under §301 of the Labor Management Relations Act ("LMRA"), Avco Corp. v. Machinists, 309 U.S. 557 (1968), and §502(a) of **ERISA**, Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987).

The DeCastro court ultimately found that no federal cause **of** action existed under New Jersey's Consumer Fraud Act and the breach of contract claim. The DeCastro court further determined that Congress never intended the Communications Act to displace state causes of action **for** breach of the duty of good faith and fair dealing and for unjust enrichment (restitution). Therefore, under the holding of DeCastro, this court lacks subject matter jurisdiction over the state claims brought forth by the representative plaintiff, and as a result, this cause must be remanded back to the Circuit Court of Pinellas County.